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Supreme Court of the United States

OCTOBER TERM, A. D., 1946.

No. 1052

CHARLES FREEMAN ALEXANDER, PETITIONER AND APPELLANT BELOW,

VS.

MARJORIE LONGAN ALEXANDER, RESPONDENT AND APPELLEE BELOW.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ARTHUR MILLER,
of Kansas City, Missouri,
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CORNELIUS ROACH,
DANIEL L. BRENNER,
of Kansas City, Missouri,
Of Counsel.

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Supreme Court of the United States

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CHARLES FREEMAN ALEXANDER, PETITIONER AND APPELLANT BELOW,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To The Honorable Fred Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action at law brought in the District Court of Johnson County, Kansas, by Marjorie Longan Alexander, respondent herein, against Charles Freeman Alexander, petitioner herein, to recover sums of money allegedly due respondent from petitioner under the terms of a property settlement agreement entered into between the parties under date of March 7, 1939 (R. 7-13).

The case was duly and regularly removed to the District Court of the United States for the District of Kansas (R. 14, 16). There the trial was by the court without a jury, and a judgment was rendered in favor of respondent against petitioner for $10,220.68. An appeal from said judgment was taken by petitioner to the United States Circuit Court of Appeals, Tenth Circuit, which Court affirmed the judgment of the District Court.

Petitioner and respondent were, prior to March 14, 1939, husband and wife (R. 4). On March 7, 1939, they entered into the property settlement here involved (R. 7-14). On March 14, 1939, respondent secured a decree of divorce from petitioner (R. 5).

The contract provided that petitioner should pay respondent $10,000 in cash (R. 10); that he should pay $150 per month for the support of their three minor children (R. 10); that he would pay respondent $150 per month for her support (R. 10); that he would maintain in force for respondent and the three children insurance policies on his life aggregating $45,000 (R. 9); that respondent and the three children should have the exclusive right to occupy the residence in Kansas City, Missouri, owned by the parties in the entirety (R. 11-12); that petitioner should pay the mortgage debt against such residence (R. 11) and would pay the taxes thereon (R. 12) and the cost of exterior repairs and upkeep and the insurance thereon (R. 12); and that he would execute a will devising the residence to respondent in event she survived him (R. 12); all the furniture, furnishings and personal property in the residence were transferred to respondent (R. 12).

In addition, the second provision of Subsection 6 of the contract provided (R. 10-11):

> "Second Party shall, on or before April 15th, in each year, until the death or remarriage of First Party,

furnish and deliver to First Party, in Kansas City, Missouri, a true and certified copy of his federal income tax return for the preceding taxable calendar year, and if, as shown thereby or otherwise established, Second Party shall have gross income—from whatever source derived, excluding only capital gains—in any calendar year in excess of $7500.00, then for every such calendar year Second Party, his estate and legal representatives shall pay to First Party, in Kansas City, Missouri, in Twelve (12) equal consecutive monthly installments, commencing on the first day of May following, a further and additional sum equal to twenty per cent (20%) of the amount by which such calendar year income of Second Party exceeds the sum of $7500.00, as and for the further support and maintenance of First Party, until the death or remarriage of First Party."

This provision is the only one involved in this proceeding.

Petitioner and respondent had separated in the year 1934 (R. 26, 29, 30). In the Fall of 1937, petitioner organized a water public utility at Fort Worth, Texas (R. 30), established a residence in Fort Worth, Texas, and ever since has continuously resided there (R. 30). After the divorce decree was entered, petitioner, on March 14, 1939, married one Lou Alexander, and since their marriage they have maintained their marital domicile at Fort Worth, Texas (R. 30).

In the year 1939, Alexander received by way of salary and otherwise, $7,148.16, and Lou Alexander received $484.80. In the year 1940, Alexander received by way of salary and otherwise, $7,824.29, and Lou Alexander received $818.28. In the year 1941, Alexander received by way of salary and otherwise, $11,015.92, and Lou Alexander received $783.50. In the year 1942, Alexander received by way of salary and otherwise, $13,634.39, and Lou Alexander received $782.50. In the year 1943, Alex-

ander received by way of salary and otherwise, $14,161.42, and Lou Alexander received $968.80. In the year 1944, Alexander received by way of salary and otherwise, $17,-138.02, and Lou Alexander received $1,019.64 (R. 31, 32, 49 to 107, incl.).

The respondent contended and the trial court ruled that the term "gross income" as used in the contract meant the total amount of income accruing to petitioner by way of salary or returns on his investments.

Petitioner contended that since at all times in question he was married and a resident of Texas, he was subject to the community property law of that State; that by virtue of the Texas community property law each spouse has a vested interest in one-half of the income of the other, hence petitioner's "gross income" was one-half of his and his wife's total gross income.

The ruling and judgment of the District Court was affirmed by the Circuit Court of Appeals, Judge Phillips dissenting (R. 125, 135).

Petitioner filed a petition for rehearing, which was overruled, and at that time Judge Broaddus, District Judge, delivered a special concurring opinion (R. 135).

JURISDICTIONAL STATEMENT.

(a) Statutory provision believed to sustain the jurisdiction of this court.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Statutes 938 (28 U. S. C. A. 347(a)), and under the same Act, Chapter 229, Section 8, 43 Statutes 940 (28 U. S. C. A. 350).

(b) The date of the judgment to be reviewed.

The judgment of the Circuit Court of Appeals affirming the judgment of the District Court was entered No-

vember 7, 1946 (R. 136), and petitioner's petition for rehearing was denied on December 6, 1946 (R. 151). This petition for writ of certiorari and supporting certified transcript of the record were filed in this Court within three (3) months from December 6, 1946.

THE QUESTION PRESENTED.

The question here presented is: What is the "gross income" of a married man who has established and maintains his marital domicile in the State of Texas and is subject to the community property law of that State?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals has held in this case that the gross income of a married man who has established and maintains a marital domicile in the State of Texas, and is subject to the community property law of that State, is the total amount of the earnings and profits produced by him. In so holding, the Court has decided an important question of local law in a way in conflict with applicable local decisions and the decisions of this Court.

Article 4619, Section 1, Vernon's Civil Statutes of Texas, 1925 Revision.

Burnham v. *Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139.

Arnold v. *Leonard*, ... Tex. ....., 273 S. W. 799.

De Blane v. *Lynch*, 23 Tex. 25.

Hopkins v. *Bacon*, 51 Sup. Ct. Rep. 62.

Commissioner of Internal Revenue v. *King*, 69 F. 2d 640 (C. C. A. 5).

2. Although it was undisputed that petitioner was lawfully married and domiciled in Texas, and subject to

the community property law of that State, the Circuit Court of Appeals held that the phrase "gross income" should be construed to mean the gross income that would have inured to petitioner had he been single, or a married person with his marital domicile in Missouri, and in so holding introduced hypothetical facts contrary to the facts in the case, and in so doing so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Record page 30.
Record page 114.
Record page 126.
Dissenting opinion of Judge Phillips (Record 133).
Rule 38, 5 (b).

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals for the Tenth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the Tenth Circuit in the case entitled Charles Freeman Alexander, Appellant vs. Marjorie Longan Alexander, Appellee, Docket No. 3335, to the end that this cause may be reviewed and determined by this Court; that the judgment herein of the United States Circuit Court of Appeals for the Tenth Circuit be reversed by this Court; and that the petitioner be granted such other and further relief in the premises as to the Court may seem appropriate and proper.

Charles Freeman Alexander, Petitioner,
By ARTHUR MILLER,
Counsel for Petitioner.

CORNELIUS ROACH,
DANIEL L. BRENNER,
Of Counsel.

Dated February 18, 1947.

Supreme Court of the United States

OCTOBER TERM, A. D., 1946.

No. _____.

CHARLES FREEMAN ALEXANDER, PETITIONER AND APPELLANT BELOW,

VS.

MARJORIE LONGAN ALEXANDER, RESPONDENT AND APPELLEE BELOW.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The opinion of the District Court is not repeated, but appears in full in the record (R. 112-121).

The opinion of the Circuit Court of Appeals is not repeated, but appears in full in the record (R. 125-129). The dissenting opinion of Judge Phillips appears in the record (R. 129-135).

II.

STATEMENT OF BASIS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1, 43 Statutes 938 (28 U. S. C. A. 347(a)), and under the same Act, Chapter 229, Section 8, 43 Statutes 940 (28 U. S. C. A. 350).

III.

STATEMENT OF THE CASE.

Petitioner has stated the case in the "Summary Statement of the Matter Involved" in the foregoing petition for writ of certiorari, which is hereby adopted and made a part of this brief.

IV.

SPECIFICATION OF ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in affirming the judgment of the District Court in favor of respondent.

2. The Circuit Court of Appeals erred in not holding that the "gross income" of the petitioner, a married man, domiciled in Texas and subject to the community property law of that State, is one-half of his and his wife's gross income.

3. The Circuit Court of Appeals erred in deciding the case upon hypothetical and supposititious facts and not upon the actual facts submitted.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

POINT A.

Since the petitioner was at all times in question married, with the marital domicile in Texas and subject to the community property law of that state, his "gross income" in any year was one-half of his and his wife's total gross income.

POINT B.

The meaning of the phrase "gross income" as used in the contract in question was unambiguous and not subject to interpretation.

POINT C.

The circuit court of appeals did not decide the case upon the actual undisputed facts but upon hypothetical facts assumed by the court.

Petitioner contracted to pay a sum equal to twenty per cent (20%) of the amount by which his calendar year income exceeded the sum of $7,500.

At all times in question petitioner was married; his marital domicile was in Texas and he was subject to the community property law of that State.

It has been repeatedly held by the courts of the State of Texas and it has been held by this Court that under the community property law of Texas each spouse has a vested interest in one-half of the earnings or income of the other; that each spouse becomes the absolute owner of an undivided one-half interest in property acquired during coverture at the very moment of its acquisition,

and that each spouse in point of ownership has equal rights with those of the other spouse.

The rights of husband and wife in community property in Texas are perfectly equal. In *Arnold* v. *Leonard*, ... Tex. ....., 273 S. W. 799, 804, the court said:

> "* * * each marital partner owns an estate in the community property equal to that of the other partner; * * *"

In *De Blane* v. *Lynch*, 23 Tex. 25, 29, the court said, in part:

> "It is true, that in a particular case, satisfactory proof might be made, that the wife contributed nothing to the acquisitions; or, on the other hand, that the acquisitions of property were owing wholly to the wife's industry. But from the very nature of the marriage relation, the law cannot permit inquiries into such matters. The law, therefore, conclusively presumes that whatever is acquired, except by gift, devise or descent, or by the exchange of one kind of property for another kind, is acquired by their mutual industry."

In *Burnham* v. *Hardy Oil Co.*, 108 Tex. 555, 195 S. W. 1139, 1143, the court said, in part:

> "In this State, the beneficial interests of the husband and wife in community property are equal, whether the grant or deed to the property be in the name of only one of them or to them jointly. Though the grant or deed be in the name of the husband, alone, the 'interest' or 'estate' of the wife in the property is as absolute as that of the husband. She acquires her interest in virtue of our law governing community property, and the force which that law imparts to a conveyance of the property to the husband during the marriage. She takes under a grant or deed in his name to the same extent that he does; and it is as fully through the grant as is true of his interest, that she is invested with her right."

In *Hopkins* v. *Bacon*, 51 Sup. Ct. Rep. 62, this Court said (l. c. 63):

"The statutes contain sweeping provisions as to what shall be included in community property. They provide that each spouse shall have testamentary power over his or her respective interest in the community property. In the event of failure to exercise such testamentary power they provide that the property shall go in the first instance to the descendants of the deceased spouse. They provide, as is usual in States having the community system, that the husband shall have power of management and control such that he may deal with community property very much as if it were his own. In spite of this, however, it is settled that in Texas the wife has a present vested interest in such property. *Arnold* v. *Leonard*, 114 Tex. 535, 273 S. W. 799. Her interest is said to be equal to the husband's. *Wright* v. *Hays*, 10 Tex. 130, 60 Am. Dec. 200. It is held that the spouses' rights of property in the effects of the community are perfectly equivalent to each other. *Arnold* v. *Leonard*, *supra*. These expressions as to the wife's interest are confirmed by the authorities holding that if the husband, as agent of the community, acts in fraud of the wife's rights, she is not without remedy in the courts. *Stramler* v. *Coe*, 15 Tex. 211; *Martin* v. *Moran*, 11 Tex. Civ. App. 509, 32 S. W. 904; *Watson* v. *Harris*, 61 Tex. Civ. App. 263, 130 S. W. 237; *Davis* v. *Davis*, (Tex. Civ. App.) 186 S. W. 775.

"The applicable statutory provisions are noted in the margin.

"In view of what has been said in No. 15, it remains only to say that the interest of a wife in community property in Texas is properly characterized as a present vested interest, equal and equivalent to that of her husband, and that one-half of the community income is therefore income of the wife. She and her husband are entitled to make separate re-

turns, each of one-half of such income. The judgment of the Circuit Court of Appeals is affirmed."

Article 4619, Section 1, Vernon's Civil Statutes of Texas, 1925 Revision.

Commissioner of Internal Revenue v. *King*, 69 F. 2d 640 (C. C. A. 5).

We submit that petitioner could not have a greater "gross income" than that permitted to him under the law to which he was subject. He was married; his marital domicile was Texas; he was subject to the provisions of the community property law of that State. By that law his second wife had a present vested interest in one-half of his earnings and income, and he had an equal vested interest in one-half of her earnings and income.

It inevitably follows that under the settled law, petitioner's gross income for all purposes was one-half of his and his second wife's total gross income.

In holding, under the undisputed facts in this case, that petitioner's "gross income" was his total earnings and income, the Circuit Court of Appeals decided an important question of local law in a way directly in conflict with applicable local decisions and the decisions of this Court.

POINT B.

The meaning of the phrase "gross income" as used in the contract in question was unambiguous and not subject to interpretation.

Petitioner respectfully submits that the phrase "gross income," as used in the contract, is plain and unambiguous and, therefore, not subject to interpretation by the court.

It is, of course, true that in case of ambiguity the courts will seek out and lean toward the presumed in-

tention of the parties, but where the language used is not ambiguous, the words used must be given their plain and literal meaning, even though the intention of the parties might have been different from that expressed.

MacDonald v. *Commissioner of Internal Revenue,* 76 F. 2d 513 (C. C. A. 2).

Robbins v. *Rollins,* 127 U. S. 622, 8 S. Ct. 1339, 32 L. Ed. 292.

Calderon v. *Atlas Steamship Co.,* 170 U. S. 272, 18 S. Ct. 588, 42 L. Ed. 1033.

Graham v. *Business Men's Assurance Co. of America,* (C. C. A. 10) 43 F. 2d 673.

Although the opinion of the Circuit Court of Appeals does not so state, it treats the phrase "gross income" as ambiguous and therefore subject to interpretation.

The majority opinion states:

> "The question posed turns upon an interpretation of the phrase 'gross income' as the parties understood and used that term when they executed the contract."

Petitioner contends that the phrase "gross income" as used in the contract here has a clear and definite meaning; that it means gross proceeds, earnings or receipts, and that the sole question presented in the case was the determination of the amount of petitioner's gross income under the facts and the law applicable to petitioner by reason of his residence and marital status.

POINT C.

The circuit court of appeals did not decide the case upon the actual undisputed facts but upon hypothetical facts assumed by the court.

In his dissenting opinion, Judge Phillips said:

> "What counsel for Marjorie L. Alexander really assert, and what the trial court in effect held, is that the phrase 'gross income' should be construed to mean the gross income that would have inured to Alexander if his status had been either that of an unmarried person or of a married person with his marital domicile in Missouri. That would introduce hypothetical and undeterminable factors into the situation. We have no way of knowing what Alexander's income might have been had he remained single. It is common knowledge that a good wife may contribute much to the earning capacity of her husband. Likewise, we have no way of knowing what Alexander's earning opportunities would have been had he remained in Missouri."

It is apparent that the majority opinion of the Circuit Court of Appeals dealt and treated with petitioner as if he were single, or if married, he were a resident of Missouri. The undisputed facts are that petitioner was lawfully married and a resident of the State of Texas and subject to the community property law of that State; hence the Circuit Court of Appeals failed to decide the case which was submitted to it, and its opinion is based upon hypothetical facts assumed by the court. In so doing, the Circuit Court of Appeals so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the said decision.

ARTHUR MILLER,
Counsel for Petitioner.

CORNELIUS ROACH,
DANIEL L. BRENNER,
Of Counsel.

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No. 1052.

In the Supreme Court of the United States

October Term, A. D. 1946.

CHARLES FREEMAN ALEXANDER, *Petitioner and Appellant Below,*

vs.

MARJORIE LONGAN ALEXANDER, *Respondent and Appellee Below.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the Supreme Court of the United States

October Term, A. D. 1946.

CHARLES FREEMAN ALEXANDER, *Petitioner and Appellant Below,*

vs.

MARJORIE LONGAN ALEXANDER, *Respondent and Appellee Below.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

No. 1052.

STATEMENT OF THE CASE.

This is an action to enforce the provisions of a property settlement agreement. It was first tried in the United States District Court for the District of Kansas, and resulted in a judgment for respondent. On appeal to the United States Circuit Court of Appeals, Tenth Circuit, the judgment of the District Court was affirmed.

Petitioner in his statement of the case failed or neglected to show that the property settlement agreement was

made in Kansas City, Jackson County, Missouri (R. 7); that the opening paragraph of the contract recited that petitioner was "of Jackson County, Missouri" (R. 7); that it affected property located in Kansas City, Missouri; that every obligation of the contract was to be performed in Kansas City, Missouri, and every payment petitioner was required to make was to be made in Kansas City, Missouri, including the payments of twenty per cent (20%) of his gross income in excess of $7,500.00 in each calendar year (R. 7 to 14).

Petitioner's principal income came from the Kansas City Suburban Water Company, 4502 West 59th Street, Mission, Kansas, a suburb of Kansas City, Missouri, which paid him a salary of $7,375.00 in 1944, and the Texas Water Company, 112 Baurline Street, Fort Worth, Texas, which paid him a salary of $9,225.00 in 1944, as president of both of said companies; and his salary from these companies in other years in controversy was in substantially the same proportion (R. 97, 105).

ARGUMENT.

Point A.

Respondent denies that the question stated by petitioner is presented.

The decision of the United States Circuit Court of Appeals does not involve the decision of that court of "an important question of local law in a way probably in conflict with the applicable local decisions." The decision involved the interpretation of a property settlement agreement having no general public interest. The clause of that contract in controversy appears in the second paragraph of Subdivision 6 (R. 11), which requires petitioner, his estate or legal representatives, to pay to respondent in Kansas City, Missouri, for each calendar year, twenty per cent (20%) of his gross income in excess of $7,500.00 for that year.

Petitioner executed the property settlement agreement in Kansas City, Missouri, on the 7th day of March, 1939. Respondent obtained a divorce from petitioner on March 14, 1939, in Kansas City, Missouri. The divorce decree expressly approved and ratified the property settlement agreement. On the same day that the decree of divorce was granted, petitioner married Lou Carrol, and thereafter established a marital residence in Fort Worth, Texas.

The Circuit Court of Appeals stated that "the question posed, turns upon the interpretation of the phrase 'gross income' as the parties understood and used that term when they executed their contract," and held:

> "Admittedly, this is a Missouri contract. The parties lived in Missouri, the contract was executed in Missouri, and was to be performed there. It follows

that the contract is to be interpreted under the laws of Missouri.

There is no uncertainty or ambiguity in the subject matter or the result sought to be accomplished by the execution of the contract" (R. 127);

and under the Missouri law "gross income" includes gains from whatever source derived.

The opinion of the Circuit Court of Appeals, which affirmed the decision of the trial court, concluded:

> "Of course, he (Alexander) could go to Texas, but when he went he did not take the contract with him. It remained in Missouri, so to speak, a Missouri contract subject to Missouri law, and subject to interpretation under that law. His removal to Texas did not change a Missouri contract into a Texas contract. His obligation under the contract still depended upon the law of Missouri, the place where the contract was made. When he executed this contract in Missouri, he fixed his liability under the canopy of Missouri law, and he remains thereunder until the performance of the contract is completed" (R. 129).

Petitioner recited in the opening paragraph of the property settlement contract that he was "of Kansas City, Jackson County, Missouri" (R. 7), and he is estopped to deny that. As pointed out by Judge Broaddus in his concurring opinion:

> "The majority opinion states with clarity the holding of the court. I am in full accord with the court's conclusion that the parties intended the property settlement agreement to be construed and understood as a Missouri contract, and the parties did not intend to give extra-territorial effect to the community property laws of the State of Texas.
>
> It should be made clear, however, that at the time the agreement was executed, Alexander had been

> living in Texas for a period of over eighteen months. Notwithstanding that fact, the contract recited that Alexander was a resident of Jackson County, Missouri. That he could be living and working in one place while his legal residence was in another is academic. The legal residence of a person is a question of intent. It follows that when Alexander, by written contract, fixed his residence in Missouri, it was a binding declaration of the place of his residence, and a further indication that he intended his obligations under the property settlement agreement to be those of a resident of Missouri" (R. 135-6).

Judge Helvering of the United States District Court for the District of Kansas, who conducted the original trial of the case, held that:

> "The meaning of the term 'gross income' as used in the second paragraph of Subdivision 6 of the property settlement agreement is governed by the law of the state where the property settlement agreement was executed and where such agreement was to be performed and by the intent of the parties to said agreement.
>
> The application of the Texas community property law to gross income received in that state, and, particularly, as such application may affect the nature of gross income as shown on federal income tax returns by citizens and residents of that state, does not control the meaning of the term 'gross income' as used in the said property settlement agreement executed in Missouri between parties who were citizens and residents of Missouri at the time of the execution of such agreement and which agreement was to be performed in Missouri (R. 118, 119; 64 F. Supp. 123).

The opinion of the Circuit Court of Appeals affirmed the decision of the District Court, Circuit Judge Huxman writing the opinion of the court; Circuit Judge Phillips

dissenting; and District Judge Broaddus writing a concurring opinion (R. 125; 158 F. (2d) 429).

The decision turned on whether the property settlement agreement in controversy was a Missouri contract. If it was, then the term "gross income" was to be construed according to the laws of Missouri. The Circuit Court of Appeals held it was a Missouri contract; hence the community property law of Texas had no bearing on its interpretation.

> 41 C. J. S., Sec. 101: "Ordinarily the validity and interpretation and effect of a marriage settlement are governed by the law of the jurisdiction in which the contract of settlement was made, and are not affected by the subsequent removal of the parties to another state."
>
> Sec. 289—Restatement, Conflict of Laws: "At marriage the husband and wife respectively acquire such rights or other interests in movables then belonging to the other as are given by the laws of the domicile of the husband at the time of marriage.
>
> It is immaterial that the spouses intend after marriage to live in another place other than the domicile of the husband at the time of marriage."

The Circuit Court of Appeals in construing the property settlement agreement to be a Missouri contract, to be construed according to the laws of Missouri, did not decide an important question of local law in a way directly in conflict with the applicable local decisions and the decision of this Court.

Point B.

The meaning of the phrase "gross income" as used in the contract in question has no ambiguity, because it was to be construed under the laws of Missouri.

"Gross income," as interpreted in Missouri, includes gains, profits, and income derived from salaries, wages, or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, business, commerce, or sales or dealings in property, whether real or personal, growing out of ownership or use of or interest in such property; also from interest, rents, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits, and income derived from any source whatever.

By the terms of the property settlement agreement, capital gains, if any, are to be excluded, and therefore represents the only item of petitioner's income which could be excluded.

By holding that the contract was to be construed according to the laws of Missouri, the Circuit Court of Appeals did not make a decision as to the meaning of "gross income" which was in conflict with the applicable local decisions and the decisions of this Court.

Point C.

The Circuit Court of Appeals did not decide the case upon hypothetical facts, but upon the actual facts as shown by the record.

Petitioner misconstrued the decision of the Circuit Court of Appeals. There was no attempt to speculate upon what petitioner's income might have been if he had remained a

resident of Missouri, or remained single, as the petitioner contends the court did. In finding that the property settlement agreement was a Missouri contract, to be construed according to the laws of Missouri, the court said, in effect, that petitioner's residence and marital status were not to be considered in computing his "gross income," which was to be interpreted according to the Missouri law.

> "His (petitioner's) removal to Texas did not change a Missouri contract into a Texas contract. His obligations under the contract still depended upon the law of Missouri, the place where the contract was made; and when he executed this contract in Missouri he fixed his liability under the canopy of Missouri law and he remains thereunder until the performance of the contract is completed" (R. 129).

Conclusion.

Petitioner has misconstrued the decision of the Circuit Court of Appeals. It did not undertake to interpret the community property law of Texas; it simply held that the property settlement contract was a Missouri agreement made in Missouri, affecting property located in Missouri, by parties resident in Missouri, and by its clear intent to be construed according to the Missouri law. The principles back of that finding are established principles of general law, are academic, and are not in conflict with applicable local decisions and the decisions of this Court; and under Rule 35 do not afford a basis for granting a writ of certiorari.

This case involved particular facts, not likely to recur; it has no general public interest; a further decision by this Court would not tend to advance the public interest.

Wherefore, it is respectfully submitted that petitioner's application for a writ of certiorari should be denied.

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